Tom O'Malley Review August 2020

RCNI Commentary

I General Commentary on Review:

RCNI regards this Review and its recommendations as very positive for those who are survivors of, or witnesses to, sexual violence in criminal proceedings. Once implemented, its recommendations will improve the experience of these witnesses as they go through each stage of the criminal justice process, to a significant degree. RCNI is extremely encouraged that the Minister for Justice has decided to advance the implementation of these recommendations with all possible speed. This is all most welcome news, and we are ready, indeed eager, to play our part in this process.

This Commentary should be read alongside our Preliminary Observations on the Recommendations Framework, submitted to the Department of Justice on 16th September 2020. The full text can be found at the Appendix to this document for easy reference.

RCNI has even bigger ambitions than the implementation of Dr O'Malley's recommendations, welcome though they are. Our vision is that all vulnerable witnesses in criminal proceedings for sexual offences should have the best possible experience, and over time, this experience should improve to become the best available. If this means radical change, then so long as the changes are workable and do improve the experience of vulnerable witnesses, so be it. This means that all agencies involved in the criminal justice process should keep themselves informed as much as possible about new thinking, policies and procedures, both at home and abroad which are, or may be, workable in this jurisdiction and which could further improve the experience of this most vulnerable group of witnesses.

The implementation of these recommendations must be based on an understanding that the factors which make witnesses vulnerable in different ways at each stage of the criminal justice system vary with individuals and with the precise nature of whatever particular additional vulnerability such witnesses may have. However, each one of these witnesses has the right to the best possible range of tailored and individualised supports to ensure that they are not put further at risk by the criminal justice process itself but have the fullest possible opportunity to have their voice heard. Therefore, the recommendation framework should be flexible enough to ensure that as wide a range as possible of vulnerable witnesses will be able to have their voices heard in the criminal justice process and with the minimum of further risk to their safety and well-being, as a matter of simple justice.

To this end, inter-agency structures, even very informal ones, are extremely useful, even vital, to ensure that both new initiatives and their implementation are as robust and fit for purpose as possible. While we agree strongly with Dr O'Malley that greater inter-agency communication can ensure that each agency becomes fully familiar with the work carried out by other agencies, we think that a permanent inter-agency structure has much wider potential.

- Any such structure should bring together not only representatives from all relevant State agencies and NGOS, but also the most experienced legal practitioners available (both prosecution and defence) and NGO representatives working with groups who are additionally vulnerable (e g because they are children or because they have some form of disability) - with expertise and experience not only in their particular field but ideally also in the support of these particular vulnerable witnesses throughout the criminal justice process; and
- Further, any such structure should inform itself about, and develop links with, professionals in other disciplines relevant to the criminal justice process, such as forensic psychologists and

speech and language experts. Their perspectives can help all involved in the criminal justice process to understand better the challenges it poses to all witnesses, and especially, vulnerable witnesses. Their research can provide a firm evidence base from which to plan new administrative initiatives and to inform the drafting of new legislation. While the Review and the Recommendations Framework tell us in great detail **what** needs to be done, familiarity with the existing body of robust research findings in the areas of forensic psychology and speech and language related sciences tells us much about **why** it needs to be done.

In particular we would like to see:

- **Pre-recorded cross-examinations** of victims and other vulnerable witnesses being piloted as soon as possible once disclosure has been put on a stricter footing;
- Examination of how this works through the evidence on commission procedure in Scotland;
- **A thorough overhaul of the special measures regime:** the current legislation, though reasonably comprehensive, is difficult to use because it is so piece-meal; in our respectful submission, it is time that the Criminal Evidence Act 1992 framework was replaced by something much easier to decipher and
- That the old assumptions that only children and those with a "mental disorder" should benefit from a presumption in favour of special measures were abandoned – all victims of sexual offences should benefit from such a presumption;
- **Express statutory powers** through which the Court could make such **new** special arrangements as it thinks necessary to ensure that a witness can give his or her best evidence, even if these arrangements are completely outside the usual "menu" of possible special measures, provided that to make such arrangements is in the interests of justice. The High Court can do this through its inherent jurisdiction and in our view, it is time that the Circuit and District Court enjoyed a similar general power;
- Consideration being given as to whether it is feasible or desirable to impose any restrictions on evidence relating to such matters as **the complainant's character and/or any details of her clothing** around the time of the offence, for no other purpose than to reduce her credibility in front of the jury;
- Consideration being given as to whether it is feasible or desirable to have judges include **standard directions** to the jury on the effects of the trauma induced by rape and other forms of sexual violence on their victims, either at the beginning or end of the trial; and
- A commitment to legislate to ensure that any belief by an accused person that the other person was consenting to sexual intercourse is defined **as reasonable as well as honest**, in line with the recommendations in the relevant Law Reform Commission Report from 2019.[1]

II Appendix 4: Complete list of recommendations is included below for ease of reference – RCNI feedback is in contrasting colour at the end of each Chapter Heading below

Chapter 2: General recommendations

• Steps should be taken to increase public awareness of the terms of the Criminal Justice (Victims of Crime) Act 2017.

[1] "Knowledge or Belief Concerning Consent in Rape Law" LRC 122-2019, available online via this web-link: https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf

• There should be a government-sponsored programme of public education on the meaning and importance of consent in the context of sexual relationships and sexual activity.

• In order to promote a victim-centred approach to the provision of services, there should be greater inter-agency communication to ensure that all state agencies, voluntary organisations and non-governmental organisations dealing with vulnerable victims are fully aware of the services provided by others.

• The facilities for victims and other vulnerable witnesses should be of a consistent standard throughout the country.

RCNI Commentary: As stated in our previous short submission to the implementation body:

- It seems to us that the creation of a **Victims' Commissioner** would be a good fit to deliver on many of the recommendations here, in particular under **chapter 2 and 7** of awareness for the public and victims of the law and their rights. Also such a Commissioner might be given a role in relation to awareness raising, coordination and standards around intermediaries, advocates and those providing legal services to victims. **We would recommend that Government give serious consideration to the creation of same.**
- The recommendation to provide for Government- sponsored public education should be considered in conjunction with the rollout of the ongoing Department of Justice #noexcuses campaign and the reform of the RSE within the Department of Education as well as initiatives under the SATU review implementation work under the HSE.

Other individual topics are discussed in more detail in the following chapters, and any comments from RCNI can be found at the end of each chapter heading and list of recommendations.

Chapter 3: Investigation and prosecution of sexual offences

• All serving members of An Garda Síochána engaged in front line policing should be trained in the principles and practices to be followed when engaging with victims of sexual crime, and with other witnesses (including suspects) who may be vulnerable by virtue of age, disability or some other factor.

• The specialist training provided for those members of An Garda Síochána assigned to interview victims and other vulnerable witnesses, as well as the training provided for Garda recruits, should be regularly monitored by external experts to ensure that it is of the requisite standard and that it conforms with best international practice.

• Urgent steps should be taken to ensure that there is a complete roll out of Divisional Protective Services Units as soon as possible.

• An Garda Síochána should keep under review the number and geographical spread of special interview suites throughout the State in order to ensure that all vulnerable victims have reasonably convenient access to such a suite.

• The operation of the specialist interview suites should be periodically evaluated by an external expert who would seek the views of victims who had been interviewed within them, relevant members of An Garda Síochána and others.

• We recommend that the additional funding promised to the Office of the Director of Public Prosecutions to establish and maintain the new Sexual Offences Unit be delivered commensurate with the requirements.

RCNI Commentary: We agree with these recommendations. With regard to Garda training in sexual violence issues for first responders, RCNI and other NGOs have already been asked by GNPSB to contribute their views on what should be included in such training, now in development. This is very positive. RCNI members are able and willing to contribute to this initiative either as co-trainers or as critical readers of any training material. The dynamics and impact of sexual violence, and the prevalence of "rape myths" over the facts, are two areas in which the specialist sexual violence NGOs have expertise. They also have a deep understanding of the nature and impact of vicarious trauma, particularly as it affects specialist Garda officers working in DPSUs, including as specialist interviewers.

With regard to the development of a specialist sexual offences unit within the Office of the Director of Public Prosecutions, this is also a very positive development. A specialist approach is vital in this complex area of criminal law.

- It would also be very useful if data were to be gathered, collated and published on the proportion of sexual offences recorded in Garda files which result in a prosecution, and on the reasons why certain offences did not result in a prosecution.

Chapter 4: Anonymity, public attendance and media reporting of sexual offence trials

• Victims in all trials for sexual assault offences should remain entitled to anonymity, irrespective of the outcome of the trial.

• Introduce legislation to extend anonymity to victims in trials for offences contrary to ss. 21 and 22 of the Criminal Law (Sexual Offences) Act 2017. These sections deal with sexual abuse of persons with mental illness or a mental or intellectual disability.

• Accused persons in all trials for sexual assault offences, and not just in trials for rape offences as at present, should be entitled to anonymity unless convicted. If convicted, they may be identified unless to do that would lead to the identification of the victim.

• Persons accused of any offence contrary to ss. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017 (which outlaw various forms of child sexual exploitation) should be entitled to anonymity on the same basis as now applies to an accused on trial for a rape offence.

• The definitions of "published" and "broadcast" in the Criminal Law (Rape) Act 1981 should be reviewed to ensure that they are sufficiently comprehensive to cover publication in electronic media, including social media.

• Express statutory provision (in terms similar to those currently contained in s.6 of the Criminal Law (Rape) Act 1981) should be made for the exclusion of the public from the trials of other sexual offences that are not covered by existing legislation, where a victim may be called upon to give evidence or where there is a risk that the victim's identity might be publicly revealed.

• Those provisions in, for example, s. 6(4) of the Criminal Law (Rape) Act 1981 and s. 29(2) of the Criminal Law (Sexual Offences) Act 2017 which require that, even where a trial is held otherwise than in public, the verdict and sentence (if any) must be announced in public should be repealed.

RCNI Commentary: We also agree broadly with these recommendations. In particular, the second last recommendation on the extension of the exclusion of the public from the trials of **all** sexual offences, is very welcome.

With regard to the adequacy of the definitions of "published" and "broadcast" in the Criminal Law (Rape) Act 1981 as amended, our view is that the amendments to Sections 7 and 8 CLRA 1981 made by Section 30 (5) of the Criminal Justice (Victims of Crime) Act 2017 which include reference to the internet in the new definition of "published", and are wide enough to include broadcasting over the internet, in the new definition of "broadcast" – are both sufficiently comprehensive to capture any publication in electronic media, including social media, which takes place over the internet. However, while the definition of "broadcast" is phrased generally to include any kind of transmission, over the internet or not, the definition of "published" could be read to exclude electronic communication by text message (which does not use the internet). We think the definition of "published" should be amended to mean, published by **any** means – including, but not specifying, oral repetition, traditional print or other written medium, radio or TV broadcast, text message, by telephone/telex/fax.

Chapter 5: Preliminary trial hearings

- Legislation should be introduced, along the lines proposed in the General Scheme for a Criminal Procedure Bill drawn up in 2015 by the Department of Justice and Equality, to provide for the establishment of preliminary trial hearings. We recommend the introduction of the necessary legislation as soon as possible.

- Without prejudice to the other matters that may be addressed at a preliminary hearing, any defence application to be made at trial to question a victim about his or her sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981 should be notified to the Court at that hearing, and the Legal Aid Board notified accordingly.

- Any issues relating to the appointment or role of an intermediary, and any other special measures required for vulnerable witnesses, should also be addressed at a preliminary trial hearing.

- There should be an obligation on both prosecution and defence to notify the judge conducting the preliminary trial hearing of any outstanding matters relating, for example, to disclosure that may prevent the trial from commencing on the scheduled date.

- Lawyers in private practice representing either the prosecution or the defence should be duly remunerated for their work in preparing for and attending preliminary trial hearings.

RCNI Commentary: We have advocated for years for all of these changes[2], except the last, to which we have no objection in principle.

- We see the introduction of pre-trial hearings not only as an important means of reducing delays before and during trial, but also as a vital point at which the specific protection needs of victims can be discussed and any necessary orders made, in advance of the trial. It helps victims enormously to know well in advance of trial whether they will be able to avail of any special measures at the trial itself.
- Pre-Trial Hearings are also an opportunity for the Court to make directions to ensure that the management of the case is as efficient as possible, while ensuring that the interests of justice are upheld fully. Appropriate directions can do much to help ensure that any trial date set is effective and that numbers of late adjournments of trials are kept to a minimum. There will

[2] See for example: Reducing Delays in Court (2012), available to download via this web-link: https://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf

always be unforeseen difficulties which cause an unavoidable adjournment at the last minute, but that is no reason not to avoid all those difficulties which might reasonably be foreseen.

Chapter 6: The trial of sexual offences

• Section 3 of the Criminal Law (Rape) Act 1981, as amended, which governs the questioning of victims at sexual offence trials, should be retained in its present form, but there should be an additional provision allowing the barrister who is briefed to represent the victim when an application is being made to engage in such questioning to continue to represent the victim while the questioning, if permitted by the trial judge, is taking place.

• The right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experience) should be extended to include trials for sexual assault.

• Appropriate steps should be taken to ensure that judges and lawyers are familiar with section 21 of the Criminal Justice (Victims of Crime) Act 2017, especially as it relates to the questioning of victims during sexual offence trials.

• Where the defence intends to apply to the trial judge for leave to question a victim about other sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981, it should be required to notify the judge conducting the preliminary trial hearing of that intention. It is only in exceptional circumstance that such an application should be permitted at trial unless it has been notified at the preliminary trial hearing.

• Once notification has been given at a preliminary trial hearing of intention to apply for leave to question a victim at trial under the terms of section 3 of the Criminal Law (Rape) Act 1981, the Legal Aid Board should be immediately informed. The Legal Aid Board, in turn, should endeavour to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence.

• Effective steps should be taken to bring the existence of section 19A of the Criminal Evidence Act 1992 regarding the disclosure of counselling records to the attention of victims and any persons who are advising them. It is important that victims should be aware of their right to object to the disclosure of such records.

• Further consideration should be given to the question of whether the disclosure of medical records should be made subject to a statutory regime similar to that applicable to the disclosure of counselling records.

• A positive obligation should be imposed, by statute if necessary, on all statutory or public bodies, voluntary bodies and independent counsellors holding counselling records to furnish those records promptly to the Director of Public Prosecutions once requested to do so.

• A formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage. There should be a periodic evaluation of the process and, as part of that, feedback should be sought from victims as to their experience of this aspect of the criminal investigation**.**

RCNI Commentary:

Section 3 Criminal Law (Rape) Act 1981 as amended

With regard to the preservation of Section 3 Criminal Law (Rape) Act 1981, we agree that it should be retained – this is an important protection for victims. We also agree that the right to separate legal representation under Section 4A of the same Act, should apply to the highest volume sexual offence, namely sexual assault. However, we must respectfully disagree that the Section should remain in its present form. The language in relation to the relevant test for admissibility especially, is convoluted and hard to understand. We think the whole Section could be redrafted in a much simpler way[3].

In this regard, we note that the Law Reform Commission has already undertaken to review these provisions as part of its work on the Fifth Programme of Law Reform (2019). We suggest that as part of this Recommendation Framework, a small amendment is made to Section 4A to extend separate legal representation on Section 3 leave applications to victims of sexual assault and that the views of the Law Reform Commission are awaited before a more radical overhaul of all the "other sexual experience" provisions is undertaken.

Finally with regard to Section 3 applications for leave, we note the recommendation that the Legal Aid Board should endeavour to ensure that counsel instructed to appear for the complainant on such an application should be of a similar level of seniority to that of prosecution and defence counsel. With great respect to Dr O'Malley, this may pose some practical difficulty, as senior counsel are often already engaged in full-length trials or in sentencing hearings which do not lend themselves easily to being handed over to another barrister. Further, our experience tells us that junior counsel representing complainants are generally perceived to serve their clients extremely well, despite the disadvantages of having to pick up a case and take instructions very quickly indeed. We suggest that it would make more sense to amend the legislation to ensure that separate legal representatives were entitled to have access to the complainant's statement and a summary of the relevant aspects of the prosecution case. Directions could be given at the pre-trial hearing to the effect that counsel for the complainant would have adequate time to prepare themselves fully to represent her.

Disclosure

With regard to the inclusion of medical records under Section 19A of the Criminal Evidence Act 1992 as amended, in addition to counselling records, we think this is a good idea in principle. However, the difficulty with Section 19A is that it only comes into play if the complainant has not "expressly waived" her right to object to disclosure being made. In practice, most complainants are asked to sign these waivers at an early stage by investigators. It is not likely that there will be a prosecution in the absence of disclosure, and very few complainants are willing to do anything to decrease the chances of the case being prosecuted[4].

We suggest that the operation of Section 19A is studied in some detail before any decisions are taken on how it should be amended to include any additional categories of disclosable material. With great

[3] See further in our position paper: "Previous Sexual History and Separate Legal Representation" (2012) which includes a list of detailed recommendations at the end. It is available via this web-link: https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf

[4] We understand that there are no recent figures available from the DPP on the number of sexual offences prosecuted as a proportion of all sexual offences investigated and on which files are sent to the DPP by Gardaí. However, in "Rape and Justice in Ireland" (2009), Liffey Press, Dublin, Hanly et al reported that the DPP directed there should be no prosecution in 70% of the rapes against adults investigated in the Garda files referred to the DPP during the course of the study.

respect to Dr O'Malley, our view is that while it is important to do more to make sure that victims are informed about this right, this will not be enough on its own to ensure that it is taken up more often.

On a separate point, we do not agree that there should be an unqualified positive obligation on third parties to furnish counselling records to the DPP on request. There should not be any sharing of such confidential documents in the absence of **informed consent** from the person to whom they relate. Victims also enjoy rights under Data Protection legislation which must be balanced in a necessary and proportionate manner against those of others involved in the criminal justice process.

Further, we understand that An Garda Síochána have already begun work on a formal code of practice on the collection and disclosure of victims' digital material. We welcome this, and we also agree that there should be a periodic evaluation of this process which involves victims' own experiences in this regard. We would only add that it should be an independent process.

Chapter 7: Information for victims

- The Department of Justice and Equality or an appropriate state agency should establish a website, the existence of which would regularly be brought to public attention, containing comprehensive information for victims of sexual crime. This information should be presented in a clear and accessible manner and deal with matters such as the reporting of sexual offences, the trial process, the availability of legal advice, and the availability of counselling, therapeutic and other assistance for victims.

- An Garda Síochána should develop a Garda ACTIVE Mobility App that will advise Garda members of the information they should be providing to victims in accordance with the Criminal Justice (Victims of Crime) Act 2017. The App should also, where possible, be capable of sharing to a mobile device, an email address or other information telecommunications app, an electronic version of the Victim Information Card and Victim Information Booklet in a language understood by the victim.

- Section 26(3A) of the Civil Legal Aid Act 1995 should be amended to provide that the Legal Aid Board may provide free legal advice to victims of sexual offences (and not just in cases where a prosecution is being taken).

- The range of offences to which section 26(3A) of the Civil Legal Aid Act 1995 applies should be extended to include sexual assault and the offences created by sections 3 to 8 of the Criminal Law (Sexual Offence) Act 2017 (which outlaw various forms of child sexual exploitation), section 18 (which relates to a sexual act by a person in authority with a young person aged between 17 and 18 years) and sections 21 and 22 (which relate to the sexual abuse of persons with mental illness or a mental or intellectual disability).

- Section 26(3A) Civil Legal Aid Act 1995 should further be amended to provide legal advice, in appropriate circumstances, to a parent, guardian or other responsible adult where the victim is a child or a person with a mental illness or intellectual disability. This would not apply where the parent or other responsible adult is the suspected or alleged offender.

- A court familiarisation service should be available to every victim who is due to appear as a witness in criminal proceedings. We recommend that the present witness familiarisation programme operated by the Director of Public Prosecutions and An Garda Síochána should continue and, further, that it should be available to all victims of sexual crime throughout the country. We further recommend that a similar service be available to victims in District Courts outside Dublin where generally An Garda Síochána will have carriage of the prosecution.

- Victims of a sexual offence should be entitled to have some personal support during criminal proceedings relating to the offence. We strongly commend the support now operated on a voluntary basis in the Criminal Courts of Justice in Dublin and in some other court venues, but we recommend that steps be taken to ensure that such a service, or an equivalent service of equal standard, is available to all victims of sexual crime throughout the country.

RCNI Commentary: We agree completely with the first two recommendations, and would only add that each system should contain links to specialist NGO websites and other specialist support services for particular groups, and that these links should include links to contact details for all local services.

With regard to Section 26 (3A) Civil Legal Aid Act 1995, we also agree with the recommendations and would add that we think it is important that the wording of any amended provisions makes it clear that advice is available at any stage of the criminal justice proceedings, up to and beyond the date of any sentence or appeal.

We also agree broadly with the last two recommendations on court familiarisation and court accompaniment. With regard to the latter, rape crisis centres (and as far as we are aware, all others) continue to operate court accompaniment services to any court, funded by the Department of Justice, which are available to anyone who needs them whether or not they are already rape crisis clients. RCNI is also responsible for providing national standardised training for court accompaniment volunteers (whether or not they are from member centres) and for administering the payment of expenses in respect of these volunteers. Court accompaniment services must be pre-booked, as the centres are not resourced to maintain a constant presence at any individual court. In any event, outside Dublin, Circuit Courts (and where applicable, High Courts) do not sit continuously but only for a certain number of pre-determined sittings throughout the legal year, and there are no dedicated sittings for sexual offences only.

RCNI noted with some surprise that neither SATU nor Garda accompaniment services run by specialist sexual violence NGOs including rape crisis centres, were discussed in the Review. These long-running largely Government funded support services are available free of charge to all survivors of sexual violence, whether or not they are already attending a service. They can do much to mitigate the most sensitive and difficult aspects of both SATU examinations and Garda appointments. They are staffed mainly by volunteers, with few exceptions.

With regard to the Court and Garda accompaniment (CAGA) services overseen by RCNI and funded by the Department of Justice, the reality is that the great majority of survivors have had contact already with the person supporting them before any Garda or Court accompaniment and will have contact again afterwards, often several times. In our view, it is easier for the survivor if he or she already knows the person accompanying them in advance. Not only is it easier not to meet a stranger for the first time on the day of an important appointment, but there is an opportunity to raise (and hopefully, address) any concerns in advance of that appointment.

In practice, both rape crisis centres and other specialist services provide support to victims going through the criminal justice system continuously, as and when requested, including through helplines. The Covid crisis has meant that the line between this informal ongoing support and formal accompaniment at fixed appointments (SATU, Garda and Court) has been blurred, as it has only been possible for health and safety reasons to provide limited face to face support.

RCNI's view, as already expressed in its Preliminary Observations and in an earlier submission to the Department of Justice, is that

- Support services to survivors of sexual violence should be provided whenever they are needed, from the beginning through to the end of the criminal justice process. We stress that to us, "the beginning" means any point from the end of the attack onwards;
- Support services to survivors of sexual violence should be of a consistently high standard and should be nationally standardised right across the country and in all courts;
- Support services to survivors of sexual violence who wish to engage, or who have engaged, with the criminal justice system – should be backed up by swift and easy access to legal advice as and when needed. RCNI (and other) rape crisis centres may consult RCNI Legal Policy Director on behalf of a client, or refer a client directly, to the RCNI Legal Policy Director, who is funded by the Department of Justice to provide legal advice and information, on an ad hoc basis. However this is not a substitute for providing all victims of sexual violence with the **right** to access free legal advice from the Legal Aid Board, as also recommended by the Review;
- It is time that the current system of largely volunteer-dependent support, advocacy and accompaniment for survivors of sexual violence contemplating, or already engaged in, criminal justice proceedings, was replaced by a professionalised service which will be available at the same standard and in the same way, in all areas, at least as far as the Garda and Court elements are concerned. We propose that such a service is now piloted as soon as possible, and have set out the details of that proposal in our latest submission to the Department of Justice and in our Preliminary Observations on this Review.

Chapter 8: Intermediaries

• A cohort of appropriately qualified intermediaries who have undergone a prescribed course of training on the role of intermediaries should be recruited and placed on a register. All intermediaries should have a professional background in speech and language therapy, social work, clinical psychology, occupational therapy or some cognate area.

• The task of recruiting and training intermediaries should be undertaken by the Department of Justice and Equality or an appropriate state agency. With well-established systems of intermediaries now operating in our neighbouring jurisdictions, it should be possible to draw upon their experience and expertise in establishing a training programme and assessing persons for their suitability to act as intermediaries.

• An adequate number of intermediaries should be appointed on a full-time basis, the precise number depending on the estimated demand for their services throughout the country.

• Intermediaries, where needed, should be involved from the earliest stages of the criminal process and, in particular, should be available to assist at Garda interviews of victims, defendants or other potential witnesses who may be vulnerable on account of age or physical or mental disability.

• Where at all possible, the same person should serve as intermediary in respect of a particular witness throughout the entire criminal process. An intermediary who has been involved in the Garda interview should continue to function in respect of the witness in question during the trial where one takes place.

• The role of the intermediary should essentially be an advisory one. Having assessed the communication needs of a person being interviewed by An Garda Síochána or about to testify as a witness, as the case may be, the intermediary would advise legal representatives and the court as to the most appropriate way of questioning the witness so as to enable the witness to give their best evidence.

• Intermediaries may nonetheless, on occasion, be called upon to play a more active role at the questioning of a witness as envisaged by s. 14 of the Criminal Evidence Act 1992. We therefore recommend that this section be retained.

• An administrative structure should be put in place to maintain a register of qualified intermediaries, to arrange for the recruitment of additional ones where needed, and to arrange for the assignment of intermediaries, as required and on a case-by-case basis, for Garda interviews and criminal trials.

• In the event that it proves difficult to recruit a sufficient number of appropriately qualified intermediaries within this jurisdiction, consideration should be given to entering into discussion with the relevant Northern Ireland authorities with a view to having a joint register of intermediaries. However, everyone acting as an intermediary in this jurisdiction would be required to complete a training course on the criminal process in this jurisdiction and the role of intermediaries within it.

RCNI Commentary: With regard to intermediaries, these recommendations outline a comprehensive approach which appears to be working very well in Northern Ireland. With great respect, we think it confuses two discrete roles to an extent: that of specialist communications assessor and adviser to the court, and that of interpreter in court. We will separate these roles in our remarks below:

As far as the **specialist communications assessor and adviser** role is concerned, we are in broad agreement with the approach proposed, as we know it is supported by positive experiences in both Northern Ireland and England & Wales. We think the idea of a joint register with Northern Ireland is an excellent one.

As far as the **interpreter** role is concerned, however, we have reservations about the approach recommended in the first recommendation above. It seems to us that mandated qualifications (first recommendation and last sentence in the last one) for this role may be too restrictive:

- They could have the effect of barring the involvement of a person who would be well able to interpret communications between the Court and the witness in need of mediation, simply because he or she is very familiar with the witness's way of communicating. We think the legislation should continue to allow the court to appoint someone as an intermediary to interpret the evidence of the witness - who has the ability to communicate very well with the witness, though s/he may have absolutely no formal qualifications;
- In this regard, we also recall the view of some experienced senior barristers, expressed in "Hearing Every Voice"[5], that not every witness needs an intermediary as an interpreter, and that one should not be used unless this is clearly necessary. They felt that the necessity of putting every question through the intermediary was slow, cumbersome and made it harder for the jury and the judge to follow the thread of the examination.
- We think this issue is worth some closer examination in collaboration with both practitioners and specialists in communications issues; and
- The role of any intermediary at trial should have to be considered at any pre-trial hearing.

[5] "Hearing Every Voice" (2018), RCNI led report on vulnerable witnesses, available via this web-link:

https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf

Finally, we note with some surprise that the existing gap in the legislation is not addressed, ie that Section 14 Criminal Evidence Act 1992 as amended refers only to the **questions** to be put, not to the **answers**. We think any fresh amendments should put it beyond doubt that answers as well as questions, can be mediated.

Chapter 9: Reducing delay

• The Sentencing Guidelines and Information Committee, established under the terms of the Judicial Council Act 2019, should consider giving priority to drawing up a guideline on discounts for guilty pleas and also to sentencing guidelines for sexual offences, especially those offences in respect of which there are no judicially developed guidelines.

• A system of preliminary trial hearings should be established, as already recommended in Chapter 5. The governing legislation should allow, to the greatest extent practicable, for issues that may contribute to delay in the commencement of trials or to the adjournment of trials to be addressed at such hearings.

• Further empirical research should be undertaken on the processing of sexual offence cases from the time at which a complaint is made until the case comes on for trial, in those cases where a prosecution is initiated. The purpose of this research would be to identify any problems that may contribute to delay and any measures that might be adopted to address those problems.

• Any proposal for the appointment or allocation of additional judges to the criminal courts should be preceded by an assessment of the impact which this would have on the court accommodation and facilities that are available, or that would be required, for victims and other persons participating in or attending sexual offence trials.

RCNI Commentary: We are in broad agreement with all of the recommendations under this heading, though we have some reservations about the last of them.

- In our view, it would be extremely useful if the newly established Sentencing Guidelines and Information Committee were to give priority to drawing up a guideline on discounts for guilty pleas. The benefits for the victims concerned are obvious, not least because the fear of being cross-examined is a significant source of prolonged anxiety and stress for them.
- With regard to sentencing guidelines for sexual offences, in our respectful submission priority should be given to two kinds of offence:

(1) **sexual assault**, because it is by far the highest volume offence prosecuted and

(2) the new offences created by the Criminal Law (Sexual Offences) Act 2017, not least the child exploitation offences therein. These are the two areas in which guidance is needed most urgently, in our view, as there are already several leading judgments on sentencing for rape.

- With regard to pre-trial hearings as a means of reducing delays not just before but during trials, we have advocated for them on this basis since 2008 in several detailed submissions[6] and welcome very much their high priority in the Recommendation Framework and the Department of Justice agenda. We see these hearings as the primary focus for directions to manage the case more

[6] See full reference and web-link at footnote 2 above, reproduced here for ease of reference: Reducing Delays in Court (2012), available to download via this web-link: https://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf

effectively, and very importantly, to ensure that all special measures and related matters are determined well in advance of trial. What is difficult for survivors is not just lengthy delays before trial, but also the concomitant uncertainty about whether any special measures will be granted (and related issues).

- We welcome also very much the proposal to conduct research on the causes of delays at each stage of the criminal justice process and would be delighted to assist with this in any way we can.

- Finally with regard to the appointment of new judges, we respectfully submit that if, as seems very likely from our experience of supporting many survivors whose cases are adjourned at the last minute for lack of an available judge, perhaps for as long as a year or more and perhaps more than once, more judges are needed, they should be appointed and the resources found to support them. We note that outside Dublin at least, there is some court space available at Circuit level outside of the regular Circuit (and High Court) sittings, and it must be the case that the Courts Service is able to calculate very easily the numbers of additional court staff needed to cover any extra sittings.

Chapter 10: Training

• All judges presiding over criminal trials for sexual offences and all lawyers appearing in such trials should have specialist training which equips them with an understanding of the experience of victims of sexual crime. They should also have training in connection with the questioning of witnesses who are especially vulnerable by virtue of youth or disability.

• It is recommended that the Judicial Studies Committee, established by the Judicial Council Act 2019, should consider providing such training for judges.

• The Law Society of Ireland and the Bar Council should take steps as soon as possible to provide specialist training for solicitors and barristers, respectively, who deal in any professional capacity with victims of sexual crime. This training can be delivered within existing CPD frameworks unless the professional bodies in question decide that such training can be more effectively provided by other means.

• The Director of Public Prosecutions, the Minister for Justice and Equality, the Legal Aid Board and any other public authority responsible for briefing professional lawyers in sexual offence trials should be entitled to receive, upon request, from the Law Society and the Bar Council a list of solicitors and barristers, respectively, who have satisfactorily completed the prescribed course of specialist training.

• Steps should be taken to ensure that all personnel in State Agencies who are likely to have to deal with victims of sexual crime should have appropriate training.

• The Minister for Justice and Equality should appoint a planning and implementation committee, with an appropriate range of expertise, to devise and develop a specialist training programme for legal professionals who deal with victims and other vulnerable witnesses in sexual offence cases.

• Measures, including an inspection system, should be put in place to ensure that all those who provide counselling, therapy and related services to victims of sexual crime have appropriate training. This should also apply to everyone, including legal practitioners and other professionals, involved in restorative justice programmes related to sexual offending.

RCNI Commentary: RCNI is in broad agreement also with this set of recommendations on Training.

- However, we think the second last recommendation to the effect that the Minister should appoint a planning and implementation committee – is in the wrong place. It should be at the top – this training will be most valuable, in our view, if every separate training module aimed at each separate group of legal professionals, is devised using the same core principles and shares the same core material which has a robust and up to date evidence base. This is the approach which has the best chance of delivering a coherent and consistent service to vulnerable victims. In our view, it is a role for a high-level multi-agency body which should include representation from specialist sexual violence professionals.
- All such training should be trauma-informed;
- All training should include material on the challenges faced by particular groups of vulnerable witnesses: child witnesses, recently aged-out victims of sexual violence during childhood, witnesses with a "mental disorder" as defined in the legislation, witnesses who have cognitive difficulties which fall outside the legislation, witnesses with communications difficulties who do not have a "mental disorder", witnesses from very different cultural backgrounds, and witnesses who experienced the sexual violence as part of a pattern of intimate partner violence, to give a few examples.
- All training programmes should include relevant material from specialist support services on the nature, dynamics and effects of sexual violence, and from a range of agencies whose individual focus is on particularly vulnerable groups, such as children, adults or children with one or more forms of disability;
- This relevant material should be delivered by specialist external trainers, where possible and appropriate;
- Whether this is possible or appropriate or not, representative experts across a range of specialist support agencies should be critical readers of all proposed training materials;
- All training should take into account as far as possible the latest developments in international best practice with regard to vulnerable witnesses in the criminal justice system and be reviewed and updated over time by the Planning and Implementation Committee, to reflect these developments.

Concluding Remarks

RCNI's view is that all State agencies, other criminal justice professionals and specialist sexual violence NGOs should follow the lead of other common-law jurisdictions, especially those close to home in Scotland, Northern Ireland, and England & Wales by educating ourselves in the latest forensic psychological research insofar as it is relevant to the experience of rape and sexual assault survivors. These perspectives from an external discipline should inform our thinking as advocates and executives as we continue to work together to find the best possible ways in which to treat vulnerable witnesses in criminal proceedings relating to sexual offences.

RCNI recommends that in this country, we work together whether as independent advocates, service providers, State agencies or criminal justice professionals, to create a local version of The Advocates' Gateway, an England & Wales initiative which brings together legal and forensic psychological expertise to formulate detailed guidelines and other materials to assist legal professionals to treat the most vulnerable witnesses as well as possible, so that they run the least possible risk of being re-traumatised by the process itself and also so that they can give their best possible evidence.

Especially vulnerable witnesses need an especially intensive, individualised, well-informed and effective approach. The Advocates' Gateway points the way forward in this regard: see www.theadvocatesgateway.org. A similarly intensive approach to these witnesses has been taken in

Scotland, with impressive results. See this page on their Courts and Tribunals Service website for more information:

https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/06/25/evidence-taking-reforms-making-progress.

RCNI would be happy to provide more information on any of the points raised in this document on request.

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RCNI/LPD/ED/Final

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RAPE CRISIS NETWORK IRELAND

Appendix: RCNI Priorities and NGO Actions Document

Rape Crisis Network Ireland Preliminary Observations on Priorities and NGO Actions in relation to the

Recommendation Framework of the Implementation Group of the

Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences.

Wednesday 16th September 2020

This document summarises RCNI's views on

1. what should be prioritised in the Recommendation Framework
2. what the role of specialist sexual violence NGOs should have in the implementation of this Framework
3. Gaps

1. Priorities

Training and specialisation: (2.1, 2.2, 2.3, 2.6 and high level goal 9 in particular) The gravity of the trauma must be understood thoroughly if it is to be mitigated effectively. This is why we advocate that Training must have extremely high priority and must be properly trauma-informed. Training must be intensive, it must be ongoing, it must be specialised, and it must be repeated. It must also become integrated into the working year.

We think the planning and implementation committee proposed in the recommendations has a vital role in ensuring a consistent approach across all training programmes in this area.

Reducing Delay: (4.1 & 4.2, 5.4, 5.5, 8.2, 8.3 in particular) Any measures which reduce delays before an investigation is concluded, before the DPP makes a decision on prosecution, and before a case comes to Court, deserve high priority. In this regard, we are very glad to see the recommendations on pre-trial hearings, on research into the causes of it at each stage, and on sentencing. With regard to pre-trial hearings, we are delighted that the necessary statutory provisions are being prioritised already (4.1).

The next priority should be the consideration of any special measures within pre-trial hearings to be used during the trial itself, including the notification of any intention to apply for leave to adduce evidence of other sexual experience (4.2).

Advocacy Support (6.7): The Report rightly makes the case for a national standardised and accessible victim advocate programme to provide accompaniment and support to victims. The RCNI would not confine that advocacy to the court case itself (6.7) but would extend that advocacy role to the whole process from consideration of reporting. This is of utmost priority for victims and is one of the areas currently most poorly served and resourced. The existing DJ funded national Court and Garda accompaniment programme run by RCNI nationwide, served victims in 94 sexual offences cases in 2019. The RCNI delivered the standardised training to some of the other service providers in this area. Other specialist providers are CARI, One in Four and DRCC and Victims Support at Court who provide a general service. The RCNI have been advocating that this national programme run with volunteers be professionalised along the lines of international models. The latest RCNI proposal for a National Advocacy Programme is attached.

RCNI believe that the piloting of a National Advocacy Programme should be a priority.

Legal Support (high level goal 6): The recommendations to the effect that legal advice should be available at all stages of the criminal justice process whenever needed, are very welcome. It is our view, and our experience, that access to such advice is a valuable support. It should be available not only throughout the criminal justice process up to and beyond the point of any release from prison, regardless of what the nature of the sexual offence is. Further, any training for practitioners providing this service should include material on informing victims about their rights in relation to disclosure of counselling records (5.6).

RCNI believe 6.3 the amendment of Section 26(3A) of the Civil Legal Aid Act 1995 to provide legal advice at every point from the offence onwards and to cover all sexual offences, should be the priority here.

Sexual Assault: The "Cinderella offence" The Report makes many welcome recommendations with regard treating sexual assault in the same way we treat rape offences such as extending anonymity provisions and special measures.

*RCNI suggest the most pressing priorities for this Framework in this regard is to ensure that separate legal representation under Section 4A is extended to include sexual assault, and also, to ensure that victims of sexual assault are entitled **as of right** to hearings held otherwise than in public (by way of amendment to Section 6 Criminal Law (Rape) Act 1981 as amended).*

Disclosure: (5.6 & 5.9) The legal issues involved in changing the current system are complex and need careful attention to the rights of all concerned. It is also important to find out the reasons why there has not been much take up of the existing counselling records provisions (CLSO 2017, S19A), before changes are decided upon. We believe that legal advice for victims from the point of considering a report is vital in terms of victims knowing and understanding their rights. In addition, the report was right to dwell on digital disclosure. The protocol which An Garda Síochána are preparing on digital disclosure should be an early priority and we understand that it already is.

The development of a Code on Disclosure must be a priority and must involve survivor advocates and the DPC.

2. NGO Actions in this Recommendation Framework

Information for State (and other) agencies on range of services provided by specialist sexual violence NGOs:

- RCNI can provide State agencies and others with information on the range of services provided by Rape Crisis Centres and other specialist sexual violence services to survivors of sexual violence should that be helpful. The information would include how they can be accessed and in what circumstances. The RCNI already provide a survivor focused information hub on rapecrisishelp.ie and have developed bespoke information for legal professionals also, from which we can build.
- Rape crisis counsellors and trainers are well placed to deliver training themselves, or to be critical readers for training materials, and as a Network, we are very willing to provide our specialist services and expertise.

Information for Victims:

- With regard to informing victims of sexual violence about their rights under the Criminal Justice (Victims of Crime) Act 2017, RCNI has already produced a detailed Guide to the Legal Process (2nd edition 2019[1]) which includes material on these rights, provided training to a range of professionals on victims' rights and raised awareness of same.
- RCNI website www.rapecrisishelp.ie already provides detailed information on rape crisis services, the legal process, and a range of other topics, for survivors, but in our view, it is also vital that victims can access not only this information but also detailed information on the role of each State agency and justice professional, in one place;

Support for Victims as they go through the criminal justice process:

- As per advocacy priority listed above, survivors need access to support continuously. RCNI would like to move to a professionalised, national and standardised advocacy service in which the goal is that every survivor would be entitled to emotional and sometimes, practical support from a support and advocacy worker from the point of considering reporting and whom they could contact throughout the case (and beyond).
- The RCNI provides national standardised training for the Court and Garda accompaniment service, funded by the DJ, but SATU accompaniment has no such national standardised support structure.
  Although RCCs SATU accompaniment works from an RCNI training module, national coordination and training has been absent for many years.
- Rape crisis centres, and other specialist services are not resourced to maintain a presence at any Garda station or courthouse. Our view is that the most effective support

begins long before any court or Garda appointment and lasts as long as it is needed afterwards and so the professional advocacy programme may be a better fit than stationing personnel in situ.

- As indicated above, a copy of a recent proposal to pilot a support and advocacy worker system to the Department of Justice is attached for easy reference. This includes a timeline and costings.

3. Gaps

- There is little emphasis in the Report on the needs of **child victims** in criminal proceedings. RCNI recommends that specialist services for child victims of sexual violence be represented among the NGOs, particularly those providing dedicated, specialist legal support and accompaniment services. Also, as far as we can see, the **Department of Children, Equality, Disability, Integration and Youth** is absent from this framework and not named as a responsible body for implementation. We suggest that it should be.

- It seems to us that the creation of a **Victims' Commissioner** would be a good fit to deliver on many of the recommendations here, in particular under **high level gaol 1 and 6** of awareness for the public and victims of the law and their rights. Also such a Commissioner might be given a role in relation to awareness raising, coordination and standards around intermediaries, advocates and those providing legal services to victims. **We would recommend that Government give serious consideration to the creation of same.**

- A flexible, imaginative approach to **effective special measures** is needed, so that "blue sky" thinking and novel solutions can be used to help protect this very vulnerable group. There should be space somewhere in the legislative framework (we suggest in the pre-trial hearing legislation for instance) for an intermediary to recommend, an advocate to urge, and/or a judge to direct, whatever new (but fair of course) measure seems to be most appropriate to reduce trauma and/or improve the quality of the evidence given.

- There is also little emphasis in the Report on the difficulties of making statements and giving evidence for vulnerable witnesses **with a communication difficulty** whose are **not** subject to a "mental disorder" and whose "mental condition" is not a problem, such as people with a speech impediment and/or hearing issue. This should be addressed with the assistance of experienced specialist advocates in this area.

- While we do not suggest that it should be an immediate priority, we submit that consideration should be given to increasing opportunities for these vulnerable witnesses to have their **evidence pre-recorded**, and that pre-recorded cross-examination should be piloted as soon as possible.

- We believe the **intermediary role** envisaged will need further development to be victim-centred and address the specific and individual needs of those victims. We give more detail in our fuller submission to follow.

- Finally, we respectfully submit that the reform envisaged by the report will only be fully realised if the **criminal justice system is given more capacity** through the appointment of additional judges and increased capacity is given to their support systems (in terms of Courts Service staff as well as courtroom space).